D.T.E. 01-56-A

Investigation by the Department of Telecommunications and Energy on its own motion as to the propriety of the rates and charges set forth in the following tariffs: M.D.T.E. Nos. 280 through 305, filed with the Department on July 17, 2001 by The Berkshire Gas Company.

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D.T.E. 01-56-A

ORDER ON THE MOTIONS OF BERKSHIRE GAS COMPANY AND THE ATTORNEY GENERAL FOR RECONSIDERATION, CLARIFICATION, AND RECALCULATION

I. INTRODUCTION

On January 31, 2002, the Department of Telecommunications and Energy ("Department") issued its Order in Berkshire Gas Company, D.T.E. 01-56 (2002) ("Order") wherein we approved, among other things, a rate increase of $2,267,972 for The Berkshire Gas Company ("Berkshire" or "Company"). On February 20, 2002, the Attorney General of the Commonwealth ("Attorney General") filed with the Department a Motion for Reconsideration and Clarification ("Attorney General Motion"). Specifically, the Attorney General requested reconsideration of the Department's adoption of a zero percent productivity factor for the Company's Price Cap Mechanism ("PCM" or "Plan") (Attorney General Motion at 2-3). The Attorney General also requested that the Department clarify how much we estimated the productivity study would cost Berkshire (id. at 3).

Also, on February 20, 2002, Berkshire filed a Motion for Clarification and Recalculation ("Company Motion"). The Company requests recalculation of the following items in the Company's cost of service: (1) 401(k) expenses; (2) supplemental executive retirement program ("SERP"); (3) flowback of excess deferred taxes; (4) executive compensation; (5) income tax expense; and (6) excess deferred taxes (Company Motion at 2-17). The Company also requests clarification of the following issues: (1) large industrial customer revenue adjustment; (2) incentive program expense; and (3) PCM price index adjustments (id.).

II. MOTIONS FOR EXTENSION OF THE JUDICIAL APPEAL PERIOD

With respect to the motions to extend the judicial appeal period, G.L. c. 25, § 5 provides, in pertinent part, that an appeal of a Department final order must be filed with the Department no later than 20 days after service of the order "or within such further time as the Commission may allow upon request filed prior to the expiration if the twenty days after the date of service of said . . . decision or ruling." See also 220 C.M.R. § 1.11(11). The 20-day appeal deadline indicates a clear intention on the part of the Legislature and the Department to ensure that the decision of an aggrieved party to appeal a final order of the Department be made expeditiously. Swift judicial review benefits both the appealing party and other parties, and serves the public interest by promoting the finality of Department orders. Nunnally, D.P.U. 92-34-A at 4 (1993).

The Department's procedural rules state that reasonable extensions of the appeal period shall be granted upon a showing of good cause. 220 C.M.R. § 1.11(11). The filing of a contemporaneous motion for reconsideration does not, by itself, constitute good cause for an extension of the appeal period. See New England Telephone, D.T.E. 93-125-A at 14 (1994). The Attorney General argues only that a 20-day extension of the judicial appeal period should be granted in order to preserve the Attorney General's rights on appeal (Attorney General Motion for Extension at 1). Likewise, Berkshire requests that the Department extend the judicial appeal period for an additional 20 days upon issuance of the Department's Order on the Company's and the Attorney General's motions for reconsideration, recalculation, and clarification (Company Motion for Extension at 2).

The filings by the Company and the Attorney General to extend the judicial appeal period operated to toll the appeal period for the parties until the Department rules on the motions for reconsideration, recalculation, and clarification. Nandy, D.P.U. 94-AD-4-A at 6, n.6; Nunnally, D.P.U. 92-34-A at 6, n.6. However, it does not automatically ensure that the Department will "reset the clock" by granting the extension. New England Telephone, D.P.U. 93-125-A at 12 (1994).

Applying the balancing described in Boston Edison Company, D.P.U. 90-355-A, the Attorney General and the Company have not shown good cause for a 20-day extension. However, because both the Attorney General and Company filed their motions on the last day of the appeal period, the parties would have no time to file an appeal if the Department were to deny their requests for an extension. As a matter of practice, the Department normally allows parties a few days in which to prepare an appeal even when our ruling comes after the appeal period would otherwise have expired. Nextel Communications, Inc., D.P.U. 99-59-B/95-80/95-112/96-13, at 7, Order on Appeal of Hearing Officer Ruling and Motion for Extension of Appeal (June 7, 1999). To do otherwise would effectively require parties to file both an appeal and extension request simultaneously in order to preserve their appeal rights in the event that the Department did not issue a ruling prior to the expiration of the appeal period. Id.

In these circumstances, we find that it would not unreasonably delay the finality of this proceeding, nor prejudice any party, if we grant the Company and the Attorney General a brief extension of the appeal period. While we will allow an extension of time for appeal, we will

not grant the full 20 days as requested by the Company and Attorney General. Hence, the Company and the Attorney General will have five business days from the date of this Order to file any appeal of D.T.E. 01-56-A.

III. STANDARDS OF REVIEW

A. Reconsideration

Pursuant to 220 C.M.R. § 1.11(10), a party may file a motion for reconsideration within twenty days of service of a final Department Order. The Department's policy on reconsideration is well settled. Reconsideration of previously decided issues is granted only when extraordinary circumstances dictate that we take a fresh look at the record for the express purpose of substantively modifying a decision reached after review and deliberation. North Attleboro Gas Company, D.P.U. 94-130-B at 2 (1995); Boston Edison Company, D.P.U. 90-270-A at 2-3 (1991); Western Massachusetts Electric Company, D.P.U. 558-A at 2 (1987).

A motion for reconsideration should bring to light previously unknown or undisclosed facts that would have a significant impact upon the decision already rendered. It should not attempt to reargue issues considered and decided in the main case. Commonwealth Electric Company, D.P.U. 92-3C-1A at 3-6 (1995); Boston Edison Company, D.P.U. 90-270-A at 3 (1991); Boston Edison Company, D.P.U. 1350-A at 4 (1983). The Department has denied reconsideration when the request rests on an issue or updated information presented for the first time in the motion for reconsideration. Western Massachusetts Electric Company, D.P.U. 85-270-C at 18-20 (1987); but see Western Massachusetts Electric Company, D.P.U. 86-280-A at

16-18 (1987). Alternatively, a motion for reconsideration may be based on the argument that the Department's treatment of an issue was the result of mistake or inadvertence. Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991); New England Telephone and Telegraph Company, D.P.U. 86-33-J at 2 (1989); Boston Edison Company, D.P.U. 1350-A at 5 (1983).

B. Clarification

Clarification of previously issued orders may be granted when an order is silent as to the disposition of a specific issue requiring determination in the order, or when the order contains language that is so ambiguous as to leave doubt as to its meaning. Boston Edison Company, D.P.U. 92-1A-B at 4 (1993); Whitinsville Water Company, D.P.U. 89-67-A at 1-2 (1992). Clarification does not involve reexamining the record for the purpose of substantively modifying a decision. Boston Edison Company, D.P.U. 90-335-A at 3 (1992), citing Fitchburg Gas and Electric Light Company, D.P.U. 18296/18297, at 2 (1976).

C. Recalculation

The Department's Procedural Rule, 220 C.M.R. § 1.11(9), authorizes a party to file a motion for recalculation based on an alleged inadvertent error in calculation contained in a final Department Order. The Department grants motions for recalculation in instances where an Order contains a computational error or if schedules in the Order are inconsistent with the findings and conclusions contained in the body of the Order. Western Massachusetts Electric Company, D.P.U. 89-255-A at 4 (1990); Essex County Gas Company, D.P.U. 87-59-A at 1-2 (1988).

IV. THE ATTORNEY GENERAL'S MOTIONS

A. Motion for Reconsideration

1. Introduction

In its Order, the Department approved Berkshire's proposal to use a zero percent base productivity factor for the Company's PCM. Order at 21. In doing so, the Department stated that the proposed productivity factor was consistent with the factor approved in Boston Gas Company, D.T.E. 96-50-D at 3-7 (2001). The Attorney General seeks reconsideration of the Department's decision to apply a zero percent base productivity factor (Attorney General Motion at 2-3).

2. Positions of the Parties

a. The Attorney General

The Attorney General argues that the Department erred in its reliance on Boston Gas Company, D.P.U. 96-50, at 274 (Phase I) (1996) and Boston Gas Company, D.P.U. 96-50-D (1998) ("Boston Gas") to allow Berkshire to apply a zero percent productivity factor (Attorney General Motion at 2-3). The Attorney General contends that, unlike Boston Gas, Berkshire is one of the highest-cost and least efficient natural gas local distribution companies ("LDCs") in Massachusetts (id., citing Tr. 2, at 185-186). The Attorney General reasons that because the Company is a higher-cost, less-efficient utility, Berkshire's productivity offset should be higher than the industry average (id.). Therefore, the Attorney General concludes that the Department's adoption of a zero percent base productivity was the result of mistake or inadvertence, and that a higher productivity factor should be applied to Berkshire (id.).

b. The Company

Berkshire argues that the Attorney General has not satisfied the burden to introduce new facts or extraordinary circumstances that would allow the Department to reconsider its Order (Company Reply Letter at 1). The Company maintains that the evidentiary record is devoid of any comparative analysis of Berkshire's unit cost in relation to those of other Massachusetts LDCs (id. at 1-2).

3. Analysis and Findings

The Department has previously found that the results of a company's productivity study using offsets derived from a sampling of LDCs is acceptable and that the productivity offsets need not be company-specific. Eastern/Colonial Acquisition, D.T.E. 98-128, at 63 (1999). Moreover, the Department has found that reliance on company-specific data as a measure of the productivity offset is inappropriate because (1) in a competitive market, an individual company's prices would change at the same rate as the industry average, and (2) use of a company-specific productivity factor would create a disincentive for the company to improve future productivity. NYNEX Price Cap, D.P.U. 94-50, at 163-164 (1995).

Based on the Department's well-established policies concerning productivity studies, the Department is not persuaded that using Boston Gas' productivity factor as a measure of Berkshire's productivity study was the result of mistake or inadvertence. In fact, the evidence cited by the Attorney General to persuade the Department to use a higher productivity factor consists of one statement that Berkshire's gas distribution costs are among the highest in Massachusetts (Tr. 2, at 181-182). However, the record also indicates that Berkshire's costs

are dependent on a number of variables, including weather and demographic characteristics, that do not facilitate a company-to-company cost comparison (id. at 186). Clearly, this was evidence available to the Department when we approved Berkshire's use of a zero percent productivity factor.

Thus, the Attorney General has not brought to light any previous or undisclosed facts that would have a significant impact on the decision already rendered, as contemplated by the Department's standard. Further, the Attorney General has not demonstrated that the Department's treatment of this issue was the result of mistake or inadvertence. Therefore, the Attorney General has failed to meet the Department's standard for reconsideration. Accordingly, the Department denies the Attorney General's motion for reconsideration of Berkshire's productivity factor.

B. Motion for Clarification

1. Introduction

In its Order, the Department found that if Berkshire were to conduct an independent productivity study, the likely result would be similar to the zero percent productivity factor that the Company had initially proposed, and that the cost of conducting such a study would likely outweigh any benefits of that study. Order at 21. The Attorney General seeks clarification of the expected cost of an independent productivity study that was used as the basis for the Department's decision (Attorney General Motion at 3).

2. Positions of the Parties

a. The Attorney General

The Attorney General considers the Order to be silent or ambiguous with respect to the factors that the Department considered in its decision not to require a Berkshire-specific productivity study (id.). The Attorney General states that while the Department determined that the cost of a productivity study would outweigh the benefits to the Company's ratepayers, the record does not contain a cost estimate of a Berkshire-specific productivity study, but only indicates that updating the industry study performed in D.P.U. 96-50 would be between $50,000 and $150,000, and perhaps as high as $500,000 (id., citing Tr. 1, at 46-49, 139). The Attorney General requests that the Department provide this clarification so that an accurate cost-benefit review can be made between the cost of the productivity study and the estimated $500 million in revenues that the Company would receive during the term of the PCM (Attorney General Motion at 3).

b. The Company

Berkshire maintains that the Attorney General has failed to demonstrate that the Order is silent or ambiguous with respect to the merits of requiring the Company to fund a new productivity study (Company Reply Letter at 1). Berkshire contends that the Department's conclusions on the relative cost/benefit analysis of an updated productivity study meant that the costs to perform a new study would be higher than the costs to update an existing study (Company Reply Letter at 2-3).

3. Analysis and Findings

In its Order, the Department concluded that the results of a Berkshire-specific study would likely produce the same results as found in the Company's productivity study. Order at 21, citing Exh. BG-3, at 21). Moreover, the Department determined that the cost of conducting a new productivity study would likely outweigh any benefits that could be obtained from the study. Order at 21. The record evidence demonstrates that an updated productivity study would range between $50,000 and $150,000, and could be as high as $500,000 (Tr. 1, at 46-49, 139). While the Order does not expressly state how much a productivity study would cost, the Department does not consider this absence to warrant clarification on this point. An agency need not make detailed findings on all evidence presented to it, as long as its findings are sufficiently specific to allow for appellate review. Town of Hingham et al. v. Department of Telecommunications and Energy, 433 Mass. 198, 207 (2001); Massachusetts Institute of Technology v. Department of Public Utilities, 425 Mass. 856, 858-859 (1997).

Regardless of the actual costs that may be associated with a Berkshire-specific productivity study, the Department specified the reasons why the productivity offset used for Boston Gas Company in D.P.U. 96-50 was applicable to the Company. In our Order, we found that it was reasonable for Berkshire to adopt a zero percent base productivity factor in the Company's PCM formula (i.e., the same base productivity component that was approved in D.P.U. 96-50-D). Order at 21. The Department stated that the base productivity offset approved in D.P.U. 96-50-D is not unique to Boston Gas, or any specific gas company, because the productivity and input-price-growth indices were derived from a sample of many

LDCs. Id. Indeed, in Eastern Enterprises/Colonial Gas Company, D.P.U. 98-128 (1999), we held that because productivity offsets are not company-specific, it is appropriate to use a productivity offset developed for another LDC.[1] Order at 17. Therefore, the Department finds that the exact cost of a Berkshire-specific productivity study does not require determination in this proceeding.[2]

The Order is not silent on the cost-effectiveness of a Company-specific productivity study. Nor does the Order contain language that is so ambiguous as to leave doubt as to its meaning. Therefore, the Department denies the Attorney General's motion for clarification regarding the costs of a Berkshire-specific productivity study.

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[1] Concerning the Attorney General's suggestion that the estimated $500 million in revenues that Berkshire is expected to collect during the term of the PCM justifies a Berkshire-specific productivity study, the Department considers the more appropriate basis for evaluating the cost benefits of a productivity study would be the estimated PCM-related revenues that the Company expects to collect during the term of the PCM, versus total revenues. In view of current inflation rates as would be applied to Berkshire's distribution revenues, the annual rate increases under the PCM would represent only a small percentage of the Company's total revenues over the term of the PCM.

[2] As grounds for his motion, the Attorney General argues that the evidence demonstrated that Berkshire is an above-average cost LDC (Attorney General Motion at 3). The evidence cited by the Attorney General consists of a generalized statement that Company's non-gas costs are greater than those of other utilities (Tr. 2, at 185-186). There is neither comparative evidence as to the unit costs of Berkshire versus those of other gas distribution companies, nor does the record contain the reasons for whatever differences may exist among unit costs. Without this type of comparative analysis, it is not possible to evaluate the Attorney General's claim of inefficiency on the part of Berkshire.

V. THE COMPANY'S MOTIONS

A. Motions for Reconsideration

1. Large Customer Revenue Adjustment

a. Introduction

In the Order, the Department rejected an adjustment of $87,948, representing a post-test year decrease in revenues associated with one of Berkshire's industrial customers. Order at 36-37. The Department stated that Berkshire proposed the adjustment for the first time in its reply brief (i.e., after the close of evidentiary hearings). Id. The Company is seeking reconsideration of this issue.[3]

b. The Company

Berkshire maintains that it first introduced the proposed adjustment of $87,948 during the evidentiary hearings and that the Company's reply brief later incorporated the Company's evidentiary presentation (Company Motion at 7-8, citing Tr. 3, at 263-265; Tr. 11, at 1278-1296; AG-RR-25; AG-RR-26). Berkshire claims that the adjustment is necessary as a result of being notified that the customer would be reducing its gas usage from 900 thousand cubic feet ("Mcf") per day to 700 Mcf per day, with a resulting decrease in annual base revenues associated with this customer of $87,948 (Company Motion at 7, citing Tr. 3, at 263-265). The Company contends that because this customer accounts for 4.9 percent of the

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[3] Although Berkshire characterizes its Motion as seeking that the Department "recalculate" the Order on this issue, the Company's request is more appropriately treated as a motion for reconsideration. Fitchburg Gas and Electric Light Company, D.T.E. 98-51-A at 5 (1999); Massachusetts Electric Company, D.P.U. 90-261-B at 7 (1991).

volume of gas delivered by the Company during the test year, the anticipated revenue loss falls well outside the normal "ebb and flow" of Berkshire's revenues (Company Motion at 8, citing Fitchburg Gas and Electric Light Company, D.T.E. 99-118, at 17 (2001)).

c. Analysis and Findings

The Company seeks reconsideration of the Department's finding that Berkshire did not provide any evidence supporting its proposal during the evidentiary hearing.[4] Upon further review, the Department finds that the Company did in fact propose the revenue adjustment during the course of the evidentiary proceeding (Company Motion at 7, citing Tr. 3, at 263-265). Hence, due to the Department's error in the Order, we will grant Berkshire's motion for reconsideration. In doing so, the Department shall evaluate the Company's proposed adjustment in light of long-established precedent concerning post-test year revenue adjustments.

Addressing the merits of the Company's argument, the Department notes that we do not allow adjustments for post-test-year revenues that fall within a Company's normal "ebb and flow" of customer additions or deletions. Western Massachusetts Electric Company, D.P.U. 85-270, at 70-72 (1986); Bay State Gas Company, D.P.U. 1122, at 46-49 (1982). However, if the addition or deletion of a customer or change in customer consumption, either during or after the test year, represents a known and measurable change to test year revenues, and constitutes a significant adjustment outside of the "ebb and flow" of customers, then the Department may include a representative level of sales for purposes of deriving a utility's

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[4] The Attorney General did not respond to the Company's Motion.

revenue requirement. Massachusetts-American Water Company, D.P.U. 88-172, at 7-9 (1989); Bay State Gas Company, D.P.U. 1122, at 46-49 (1982); Western Massachusetts Electric Company, D.P.U. 558, at 70-72 (1981).

The Department is not persuaded by Berkshire's argument that the magnitude of the decline in sales to this customer falls outside of the normal "ebb and flow" of customers. The Company's reliance on the Department's decision in Fitchburg Gas and Electric Light Company, D.T.E. 99-118 is misplaced. In D.T.E. 99-118, the Department permitted an adjustment to test year revenues for the loss of a customer that represented approximately 29 percent of the Company's electric industrial class operating revenues load and 8.4 percent of total base electric distribution operating revenues. Id. In the instant case, there is neither an addition nor deletion of a customer. In fact, the customer in question will be retained by the Company and will remain on the system, albeit at reduced level of consumption (Tr. 3, at 1278-1279). While Berkshire can claim that there is a "known and measurable change" to test year revenues, the Company has not provided evidence that this adjustment lies outside of the ebb and flow of customers. In addition, the Company has not demonstrated that these changes constitute a significant impact on Berkshire's operations. The proposed adjustment of $87,948 represents only 0.35 percent of the Company's approved base revenue of $26,618,410. See Order, Schedule 10. Such an amount does not impose a substantial financial burden upon the Company. Therefore, the Department denies the Company's proposal to adjust its post-test-year revenues by $87,948.

2. Incentive Program Expense

a. Introduction

In the Order, the Department rejected Berkshire's request to recover $325,433 associated with incentive payments because we found that the Company's marketing program did not provide net benefits to ratepayers. Order at 67. The Department found that the annual net margin in the test year was $180,389. Id. Berkshire requests that the Department clarify and/or reconsider our determination because the Company claims that the incentive program results in substantial benefits to the Company's ratepayers (Company Motion at 11).

b. The Company

Berkshire argues that the Department failed to consider the Company's various incentive programs' annual net margins generated over the life of the investments (Company Motion at 9-10). For example, Berkshire states that its free boiler program and the rebate program are anticipated to produce net margins of at least $1,459,080,[5] assuming a useful life of 30 years for each investment (Company Motion at 10). Thus, Berkshire asserts that, for these programs, the Company will generate a net margin of $1.5 million with a one-time cost of $190,000, resulting in an after-cost total margin of $1.3 million (id.).

Further, the Company argues that the Department's decision may deter LDCs from investing in similar programs (id.). Moreover, Berkshire contends that the Order contradicts the Department's directives in Methods and Procedures to Evaluate and Approve Energy

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[5] That is, [$22,904 (i.e., annual net margin for free boiler program) + $25,732 (i.e., annual net margin for rebate program)] x 30 years = $1,459,080 (Company Motion at 10).

Efficiency Programs, D.T.E. 98-100 (2000) ("Final Guidelines"), where we held that a cost-effectiveness analysis should be considered in light of the life of the investment (Company Motion at 10-11, citing Final Guidelines, §§ 3 and 4).

c. Analysis and Findings

The burden of proof is the duty imposed upon a proponent of a fact whose case requires proof of that fact to persuade the factfinder that the fact exists, or, where a demonstration of non-existence is required, to persuade the factfinder of the non-existence of that fact. Fitchburg Gas and Electric Light Company, D.T.E. 99-118, at 7 (2001). In order for a proponent to prevail on an issue, regardless of when the issue may have been spotlighted, that position must be supported by the record. Bay State Gas Company, D.P.U. 92-111, at 6 n.3 (1992); Boston Gas Company v. Dept. of Public Utilities, 405 Mass. 115, 122-123 (1989). Therefore, as the proponent of recovery of incentive payments, the burden of proof rests with Berkshire.

The Department's decision to reject the Company's request to recover $325,433 associated with incentive payments was based on an analysis of the total costs and benefits associated with the marketing programs over the duration of the PCM (i.e., ten years). Order at 67. In its motion, Berkshire argues that the Department should not limit its cost/benefit analysis to the test year, but should consider the life expectancy of the various measures, as discussed in the Final Guidelines.[6] We agree with the Company that an appropriate cost/benefit analysis must account for the annual net margins generated over the life of a measure.

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[6] The Attorney General did not respond to the Company's Motion.

However, Berkshire failed to provide this analysis either in its direct case, or at any time during the proceedings.[7, 8]

Berkshire has not brought to light any previous or undisclosed facts that would have a significant impact on the decision already rendered, as required by the Department's standard. Further, the Company has not demonstrated that the Department's treatment of this issue was the result of mistake or inadvertence. Therefore, Berkshire has failed to meet the Department's standard for reconsideration. Accordingly, the Department denies the Company's motion for reconsideration of incentive programs.

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[7] Furthermore, the Department notes that in view of the Company's PCM, allowing the Company to include $325,433 in its test year O&M expenses would result in an over-recovery of the Company's costs because Berkshire would recover this same amount every year over the life of the PCM. Therefore, the analysis would have to compare total costs over the ten-year period with total benefits over the life of each performance measure.

[8] The Department agrees with Berkshire that marginal customer costs should not be included in the evaluation of the "R1 to R3" programs because the customers already have the service and meter. However, we disagree with the Company that no marginal customer costs should be included in the evaluation of the "oil/electric to gas" programs. The record shows that the conversion of customers from oil or electricity to gas requires the installation of a service drop and a meter for each customer (Tr. 13, at 1473-1474). Further, the investment in these additional services and meters is included in Berkshire's plant in service (id. at 1474-1475). These are incremental costs that should have been considered in the evaluation of the marketing programs. Moreover, the fact that a gas main is in front of a customer's residence is irrelevant to the determination of the marginal customer cost because mains are not included in such a calculation (Exh. BG-20, Sch. JLH-4, at 42).

3. Price Inflation Index

a. Introduction

In its Order, the Department ordered Berkshire to calculate the price inflation index of its PCM as the percentage change between the average for the current year's and the prior year's four quarterly measures of the GDP-PI as of the first quarter of the year. Order at 20-21, citing Boston Gas Company, D.P.U. 96-50 (Phase I) at 273; NYNEX Price Cap, D.P.U. 94-50, at 141 (1995). Berkshire requests that the Department clarify its decision so as to allow the price inflation index to be calculated as of the end of the fourth quarter of each year (Company Motion at 13).

b. The Company

Berkshire states that the Department's directive regarding the calculation of the Company's price inflation index is ambiguous and may lead to ratepayer confusion (Company Motion at 12). The Company notes that although its annual compliance filings are due by May 15th of each year after the expiration of the 31–month initial rate freeze, preliminary estimates of first quarter data would not be available until the end of April, with final numbers not available until around June 30th (id. at 12-13). Berkshire is concerned that the need to revise or adjust the inflation index may lead to customer confusion and could result in procedural concerns (e.g., a notice issued by the Department upon review of the annual compliance filing may not represent the final inflation rate adjustment figure) (Company Motion at 13). Hence, Berkshire requests that the Department clarify its decision so that the price inflation index may be calculated as the average of the four quarterly GDP-PI measures as of the end of the fourth quarter (id.).

c. Analysis and Findings

While the Company has framed its request as a motion for clarification, the effect of granting Berkshire's request would be reconsideration, not clarification.[9] The Order is neither silent on the calculation of the price inflation index, nor is the language ambiguous. The Department found that the average of the prior year's and the current year's four quarterly measures of the GDP-PI as of the first quarter of the year provided for a more accurate representation of a year's inflation than mere use of the average of the prior year's and current year's fourth quarter GDP-PI. Order at 20-21. By establishing the periods to be used for calculation of the price inflation index, the Department disposed of the issue requiring determination. Cambridge Electric Light Company/Commonwealth Electric Company, D.T.E. 99-90-D at 4-5 (2001). Therefore, clarification of this issue is not necessary.

Nevertheless, even if the Department were to treat the Company's request as a motion for reconsideration, Berkshire has failed to meet the Department's standard for reconsideration on this issue. While the Company expresses a concern for potential notice requirements and customer confusion, Berkshire has not brought to light any previous or undisclosed facts that would have a significant impact on the decision already rendered, as required by the Department's standard.[10] The Company has not demonstrated that the Department's treatment

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9 The Attorney General did not respond to the Company's Motion.

10 The Department routinely accepts updated information on non-controversial items that have been adequately explored on the record, provided the utility expressly advises parties in advance of its intention to submit updates. Boston Gas Company, D.P.U. 96-50-B at 7 (1997); Bay State Gas Company, D.P.U. 89-81, at 47-48 (1989). Because updated GDP-PI rates used in computing inflation allowances are routinely accepted by the Department, an updated GDP-PI constitutes evidence of the type that the Department would accept into the record.

of this issue was the result of mistake or inadvertence. Therefore, Berkshire has failed to meet the Department's standard for reconsideration. Accordingly, the Department denies the Company's implicit motion for reconsideration of the price inflation index.

B. Motions for Recalculation

1. 401(k) Expenses

a. Introduction

In the Order, the Department directed Berkshire to capitalize 11.02 percent of its test year 401(k) expense (i.e., $233,903), resulting in a decrease to the Company's cost of service of $25,791. Order at 63. The Department also found that 17.78 percent of 401(k) costs should be allocated to non-utility operations, and therefore further reduced the Company's cost of service by $41,588. Id. at 64. Hence, the total reduction to 401(k) expense as ordered by the Department was $67,379. Id. Berkshire requests recalculations for the reasons set forth below.

b. The Company

Berkshire presents four arguments with respect to 401(k) expenses. First, Berkshire argues that there may be an inconsistency between the Department's removal of $67,379 from the Company's 401(k) expense and Schedule 2 of the Order which shows a reduction of cost of service of $76,014 (i.e., a difference of $8,635) (Company Motion at 2). Concerned that the schedule may be inconsistent with the text of the Order, the Company requests recalculation (Company Motion at 2).

Second, Berkshire states that while the Department ordered the Company to capitalize $25,791 in 401(k) expense, the Department did not provide for a corresponding adjustment to rate base for the capitalizable portion of the 401(k) expense (Company Motion at 2-3). Hence, the Company requests that the Department recalculate the associated revenue requirements, including (1) an increase of $25,791 in rate base, (2) an increase of $2,416 in return on rate base ($25,971 x 9.37 percent), and (3) an increase of $894 ($25,971 x 3.47 percent) in depreciation expense (Company Motion at 3).

Third, Berkshire argues that, although the Department ordered the Company to remove 17.78 percent in 401(k) expense allocated to non-utility operations, the Company has already made a direct charge to its propane business of 4.92 percent of its 401(k) expense, based on a payroll allocator (Company Motion at 3, citing Exh. AG 5-5; Tr. 13, at 1500). Thus, Berkshire asserts that the Department's non-utility adjustment to 401(k) expenses results in overstating the required 401(k) allocation by $11,506 (i.e., $233,903 x 4.9192 percent) (Company Motion at 3).

Finally, the Company contends that the Department's decision to remove 17.78 percent of 401(k) expense from cost of service does not account for the fact that a portion of each of the clearing accounts is charged back to utility operations (Company Motion at 3-4). In order to arrive at an appropriate 401(k) allocation, Berkshire contends that $11,275 must be added back to the Company's operations and maintenance expense through the clearing accounts (Company Motion at 3).

c. Analysis and Findings

With respect to Berkshire's concern over the perceived discrepancy between the Order and the schedules attached thereto of $8,635, in our Order the Department removed from the Company's cost of service $19,135 in health and welfare benefits associated with two former officers.[11] Order at 58. Although the Department failed to make it explicit in the section of the Order concerning 401(k) expense, a portion of the reduction cited in the 401(k) section of the Order, totaling $8,635, was attributed to our disposition of the officers' salaries and benefits package. Therefore, the Department denies Berkshire's motion for recalculation for 401(k) expenses on this point.[12]

With respect to Berkshire's requests that the Department recalculate the Company's rate base, return, and depreciation expense to account for the capitalization of a portion of the Company's 401(k) expense, Berkshire has made no showing that the Department's directive to capitalize $25,791 of 401(k) expense was the result of a computational error -- the standard for granting a motion for recalculation. When a utility commences a construction project, the total cost of the project would include the labor costs associated with construction, including some portion of the utility's payroll overhead, such as health and pension benefits. While at least some of the construction projects begun during the test year had been placed into service by the end of the test year, Berkshire has not demonstrated what portion, if any, of its test year capitalized 401(k) expenses would have been attributed to construction placed in service during the test year. Therefore, the Department will not increase rate base, nor will it make

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11 The Attorney General did not respond to the Company's Motion.

12 Issues that relate to the Company's motion for recalculation of executive compensation expense are addressed in Section V.B.4 of this Order.

corresponding adjustments to the Company's return, depreciation expense, or income taxes. Accordingly, the Department denies Berkshire's motion for recalculation of 401(k) expense on this point.

With respect to non-utility allocations, Berkshire argues that because the Company had already directly charged 4.9192 percent of its 401(k) expense to non-utility operations, the Department's Order overstated the required non-utility-related portion of 401(k) expense by $11,506, i.e., 4.9192 percent of total test year 401(k) expenses of $233,903.[13] We disagree. The Company's own allocation of 401(k) expenses does not support this position. The Company's allocation to non-utility operations of $20,934 (i.e., $233,903 in test year 401(k) expense multiplied by a payroll allocation factor of 8.95 percent) was based upon total 401(k) expenses, not total 401(k) expenses net of the amount supposedly charged directly to non-utility operations.[14] The Company's payroll allocator of 8.95 percent was based upon total payroll, not total payroll net of payroll expense allocated to the propane business (see Exh. BG-9, Supp. Sch. NU-F). As with the Company's computation, the Department's adjustment assumes no direct charge of 401(k) costs to the propane business and was calculated in the same manner as the Company's adjustment except that, unlike the Company, the Department allocated a portion of total test year 401(k) expense to conservation and load management, energy conservation

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13 The Company maintains that 401(k) expenses were directly charged to its propane business (Tr. 13, at 1500).

14 Even in its Motion, the Company continues to base its allocations upon total 401(k) expenses (Company Motion at 3). This is indicative that there was no charge of 401(k) expense to Berkshire's propane business.

activities and clearing accounts. Therefore, the Department finds that there was no computational error in the Department's Order.

Similarly, we disagree with Berkshire's argument that 401(k) costs charged to clearing accounts were improperly excluded from the Company's cost of service. The Company's functional payroll provided the basis for allocating 401(k) costs between utility and non-utility operations. Order at 63. During the test year, the Company charged $5,469,915 in payroll expense to utility operations (Exh. BG-9, Supp. Sch. NU-F). Whether this expense amount includes the charge back of payroll expense that had been initially booked to clearing accounts does not affect the Department's conclusions. If the utility payroll expense, which provides the basis for allocating total 401(k) expenses to utility operations, does not include a redistribution of payroll expense initially charged to clearing accounts, then our treatment of 401(k) costs is consistent with the Company's treatment of utility payroll costs included in the cost of service (i.e., neither payroll costs nor 401(k) expenses include the redistribution from the clearing accounts). If, on the other hand, utility payroll expense includes the redistribution of payroll from the clearing accounts, then 401(k) costs have been similarly redistributed because the 401(k) costs were allocated based upon a utility payroll expense which includes the redistribution from the clearing accounts. In either event, no computational error exists.

Based on the foregoing analysis, the Department finds that there was no inadvertent error in calculation contained in the Order. We further find that there is neither a computational error nor an inconsistency between the schedules appended to the Order and the findings and conclusions contained in the body of the Order. Therefore, no further adjustment

to Berkshire's 401(k) expense is necessary. Accordingly, the Department denies the Company's motion for recalculation of the 401(k) expense.

2. Supplemental Executive Retirement Plan

a. Introduction

In the Order, the Department denied Berkshire's proposal to recover $285,153 in cost of service for SERP expenses because we found the test year expense level was not representative, but rather the result of certain one-time provisions required as part of the acquisition by Energy East Corporation ("Energy East"). Order at 86-87. Berkshire requests that the Department recalculate SERP expenses to include a representative level of premium payments as adjusted for non-utility allocations (Company Motion at 5).

b. The Company

Berkshire states that the Department's Order erred by reducing cost of service by $285,153[15] for SERP funding, but failed to account for the Company's annual premium of $82,203 in SERP payments made during the test year (Company Motion at 5). Hence, Berkshire submits that if the Department does not accept the originally proposed cost of service adjustment of $285,153, then the Company's cost of service should be increased by $57,542[16] representing utility-related SERP premiums paid during the test year (id.).

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[15] Based upon advice from its actuary, Berkshire funded the SERP in the amount of $407,361, on the assumptions that (1) no merger had taken place and (2) two executives continued employment with the Company (Company Motion at 5). The Company then allocated 70 percent of the $407,361 to utility operations, thereby proposing a cost of service adjustment of $285,153 (id.).

[16] $82,203 x 70 percent non-utility allocation = $57,542 (Company Motion at 5).

c. Analysis and Findings

Berkshire claims that the Department made a computational error in the SERP premium expense.[17] The Department included in cost of service $189,347 in officers' life insurance premiums, which included the test year SERP expense allocable to utility operations of $57,542. Order at 87-88. Therefore, no further adjustment to Berkshire's cost of service for SERP expenses is necessary. The Department finds that there was no inadvertent error in calculation contained in the Order. We further find that there is neither a computational error nor an inconsistency between the schedules appended to the Order and the findings and conclusions contained in the body of the Order. Accordingly, the Department denies the Company's motion for recalculation of the SERP premium expense.

3. Income and Excess Deferred Income Taxes

a. Introduction

In the Order, the Department applied a federal income tax rate of 34 percent to calculate income tax expense for ratemaking purposes. Order at 163, Schedule 8. The Department also directed Berkshire to calculate excess deferred income taxes based upon actual tax rates in effect at the time that the taxes were accrued, resulting in an annual flowback of $45,356 per year. Order at 82-83. Berkshire requests recalculation of both the income tax expense and deferred income tax flowback rate using a post-merger federal tax rate of 35 percent (Company Motion at 17).

b. The Company

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[17] The Attorney General did not respond to the Company's Motion.

Berkshire contends that although the Department treated a number of expense items, such as executive compensation, on a post-merger basis, we treated income tax expense on a pre-merger basis (Company Motion at 16-17). Thus, Berkshire argues that in order to be consistent throughout the Order, a 35 percent federal tax rate should be used (and a ten-year flowback of the adjusted deferred tax balance) (id.). The Company contends that the application of a 35 percent tax rate results in taxable income of $5,294,137 (i.e., $3,217,512/0.60775, or the reciprocal of an effective 35 percent federal tax rate). The Company states that this results in an increase to federal income tax expense of $1,732,506, and a corresponding increase to Massachusetts franchise tax expense of $344,119 (id.).

Concerning the excess deferred taxes to be flowed back to ratepayers, Berkshire contends that the correct amount is $181,241, rather than the $292,095 that the Department determined to be appropriate (Company Motion at 6, 17). Berkshire cites two reasons for its proposed adjustment. First, the Company notes that the Department directed the Company to flowback to ratepayers $292,095, based on a pre-merger, 34 percent federal tax rate (id. at 17). However, Berkshire states that, in order to remain consistent with the post-merger treatment accorded to other cost of service items,[18] the Department should recalculate the Company's deferred income tax balance based upon a post-merger, 35 percent federal tax rate applicable to the Company's parent, Energy East (id.). Using this tax rate, Berkshire requests

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[18] Berkshire notes that with respect to executive compensation, the Department based its findings on a post-merger basis (Company Motion at 14).

that the Department find that the Company's excess deferred income tax balance is $187,241 (id.).

Second, the Company contests the annual flowback amount (Company Motion at 6). The Company notes that although the Department ordered an annual flowback of $45,356 over 6.44 years, it also approved a PCM with a duration of ten years (id.). Berkshire reasons that, assuming the PCM remains in effect for the full ten years, the total balance returned to ratepayers will be $453,560, in excess of the balance of $292,095 determined to be the remaining balance of excess deferred income taxes in the Order (id.). The Company submits that our directive will result in a computational error, and therefore requests that the Department recalculate the annual flowback to correspond with a ten-year flowback (id.). Alternatively, Berkshire requests that the Department clarify the Order to enable the Company to make adjustments to its base rates in one or more of its annual compliance filings to recognize the completion of the flowback of deferred income taxes based upon the 6.44 year amortization period (id.).

c. Analysis and Findings

i. Income Tax Rate

With regard to the appropriate income tax rate to be applied, Berkshire proposes that the Department recalculate the excess deferred income tax balance using a post-merger income tax rate of 35 percent, in order to achieve consistency with other adjustments made by the

Department.[19] The Company misconstrues the intent behind the Department's use of a 34 percent tax rate. The Department's long-standing precedent on income taxes is to base the utility's income tax expense on a "stand-alone" method (i.e., companies filing consolidated returns in conjunction with affiliates are treated as if the company filed a separate tax return). This is because the Department's goal of establishing just and reasonable rates requires matching the recovery of tax losses and benefits to the recovery of the underlying expense which gave rise to the tax effects, including tax benefits and losses arising from consolidated income tax returns. Massachusetts-American Water Company, D.P.U. 95-118, at 134 (1996); Massachusetts Electric Company, D.P.U. 89-194/195, at 66 (1990); Western Massachusetts Electric Company, D.P.U. 85-270-A at 132 (1986).

Companies with taxable income of between $75,000 and $10,000,000 are subject to a marginal income tax rate of 34 percent, and companies with taxable income greater than $10,000,000 are subject to a marginal income tax rate of 35 percent. 26 C.F.R. § 11(b)(1). As shown in Schedule 8 of the Order, Berkshire's taxable income on a "stand alone" basis is $5,170,766, which is less than the $10 million threshold for the 35 percent tax rate that may be applicable to Energy East. Therefore, the appropriate tax rate to determine the Company's income tax expense, including the passback of excess deferred income taxes, is 34 percent, regardless of the merger with Energy East.

Based on the foregoing analysis, the Department finds that there was no inadvertent error in calculation contained in the Order. We further find that there is neither a

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[19] The Attorney General did not respond to the Company's Motion.

computational error nor an inconsistency between the schedules appended to the Order and the findings and conclusions contained in the body of the Order. Accordingly, the Department denies the Company's motion for recalculation of its income tax expense.

ii. Excess Deferred Income Taxes

With regard to the appropriate flowback period, Berkshire correctly notes that a 6.44-year flowback of excess deferred income taxes in that amount over the ten-year duration of the PCM Plan would result in a total flowback of $453,536, i.e., $161,441 more than the actual balance of $292,095 (id.).[20] Accordingly, we will adjust downward the annual flowback of excess deferred income taxes from $45,356 to $29,209 to provide for the extended flowback period. The revised flowback is provided in Schedule 8 of this Order.

4. Executive Compensation

a. Introduction

In its Order, the Department rejected Berkshire's proposal to include in cost of service the annualized salaries of two executives who left the Company prior to the completion of the merger with Energy East. Order at 58. The Department held that because the Company would not incur any compensation costs for the departed executives, it was inappropriate to establish rates based upon the compensation package of two former Company employees. Id. Berkshire requests that the Department recalculate executive compensation such that a representative amount is included in cost of service to account for the duties that are now being

[20] The Attorney General did not respond to the Company's Motion.

performed pursuant to management services agreements with Energy East Management Company ("EEMC") (Company Motion at 15).

b. The Company

Berkshire states that while the Department excluded the payroll and benefits expense associated with the two executives (i.e., $239,769 and $19,135, respectively), the Department failed to make any corresponding adjustment to account for the services that are now being performed by EEMC, the costs of which are allocated in turn to the Company (id.). In order to develop a representative level of EEMC expenses, Berkshire requests that the Department annualize the $48,670 in EEMC expenses that were incurred between September 1, 2000 and December 31, 2000, resulting in an expense of $146,010 (Company Motion at 16).[21]

c. Analysis and Findings

As noted in the Order, to establish rates the Department relies on historical test year data, adjusted only for known and measurable changes.[22] See Order at 75. The Company has proposed a pro forma level of EEMC charges based on both an annualized level of test year expenses and post-test year bookings. The actual expense varies on a month-by-month basis, to a degree that makes comparison of one month with another a difficult task (see DTE-RR-1 (Supp.)). While it is known that the Company will incur some level of charges from EEMC in the future, Berkshire has failed to demonstrate that either the level of EEMC charges incurred

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21 According to the Company, EEMC's charges to Berkshire during four months of 2001, other than rate case expense, were $24,571 during May 2001, $27,598 during June 2001, $20,876 during September 2001, and $39,614 during October 2001) (Company Motion at 16, citing DTE-RR-1 (Supp.)).

22 The Attorney General did not respond to the Company's Motion.

during the test year or the EEMC charges incurred during the last four months of 2001 are representative of the charges that the Company would incur on an annualized basis. Therefore, the Company's alternative calculations of its EEMC charges are neither known nor measurable.

Based on the foregoing analysis, the Department finds that there was no inadvertent error in calculation contained in the Order. We further find that there is neither a computational error nor an inconsistency between the schedules appended to the Order and the findings and conclusions contained in the body of the Order. Accordingly, the Department denies the Company's motion for recalculation of its executive compensation expense.

VI. SCHEDULES

VII. ORDER

Accordingly, after due notice and consideration, it

ORDERED: That the Attorney General's Motion for Reconsideration be and hereby is DENIED; and it is

FURTHER ORDERED: That the Attorney General's Motion for Clarification be and hereby is DENIED; and it is

FURTHER ORDERED: That Berkshire Gas Company's Motion for Reconsideration be and hereby is DENIED; and it is

FURTHER ORDERED: That Berkshire Gas Company's Motion for Clarification be and hereby is DENIED; and it is

FURTHER ORDERED: That Berkshire Gas Company's Motion for Recalculation be and hereby is DENIED; and it is

FURTHER ORDERED: That Berkshire Gas Company shall comply with all directives contained herein.

By Order of the Department,

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James Connelly, Chairman

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W. Robert Keating, Commissioner

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Paul B. Vasington, Commissioner

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Eugene J. Sullivan, Jr. Commissioner

_____
Deirdre K. Manning, Commissioner

Appeals as to matters of law from any final decision, order or ruling of the Commission may be taken to the Supreme Judicial Court by an aggrieved party in interest by the filing of a written petition praying that the Order of the Commission be modified or set aside in whole or in part.

Such petition for appeal shall be filed with the Secretary of the Commission within twenty days after the date of service of the decision, order or ruling of the Commission, or within such further time as the Commission may allow upon request filed prior to the expiration of twenty days after the date of service of said decision, order or ruling. Within ten days after such petition has been filed, the appealing party shall enter the appeal in the Supreme Judicial Court sitting in Suffolk County by filing a copy thereof with the Clerk of said Court. (Sec. 5, Chapter 25, G.L. Ter. Ed., as most recently amended by Chapter 485 of the Acts of 1971).